

**A New Castle City Board of Adjustment Hearing took place on
September 21, 2009 at 7:00 p.m. in the City of New Castle's Town Hall.**

Present: Mayor John F. Klingmeyer
Roger A. Akin, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7:00 p.m. City Solicitor Roger Akin and City Engineer David Athey were introduced.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Twin Spans Business Park, LLC, 29 East Commons Blvd., Suite 100, New Castle, Delaware, to reduce the required 20 foot sideyard setback to 4.8 +/- feet, which is the current setback of an existing building located at 400 Ships Landing Way, New Castle, Delaware, parcel number 21-012.00-001.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Monday, September 21, 2009 at 7:00 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Street, New Castle, Delaware.+

An affidavit of publication was published in the News Journal on 9/6/09.

Mr. Bergstrom confirmed that the property has been properly posted. He then provided a brief background of the application. The applicant is proposing raising the walls of the existing building which are approximately 4.8 feet from the adjacent R3 property line and City Code requires a 20 foot setback when an industrial building is located next to a residential district. Raising the walls of the building represents an increase in volume of a now non-conforming structure. The application fee has been paid.

(All parties providing testimony were sworn in by the Mayor.)

Mr. Shawn Tucker is representing the applicant, Twin Spans Business Park LLC. He confirmed Mr. Bergstrom's background description. This existing non-conforming situation was established in the early 1970s. The height being proposed is within the height limitations in the Code. Their application focuses on the variance request for the setback. The building height will increase about 12 feet for storage purposes which is driven by the market to allow them to be more competitive. The current height is approximately 27 feet and the additional 12 foot height would still be under the 45 foot limitation.

Mr. Mark Ziegler, Civil Engineer with McBride and Ziegler, presented to the Board. He used a color aerial photograph to describe the location of the property in question with its surroundings. A record plan from Tetra Tech recorded on 12/1/94 showing the current footprint that was previously approved by the Planning Commission and Council was distributed to Board members and entered as Applicant Exhibit #1. Mr. Athey disclosed that he was responsible for the plan's preparation while employed at that time at Tetra Tech, but Mr. Akin stated there is no conflict of interest that would prohibit his hearing and voting on this application. Mr. Tucker noted a bump out on the building where railroad

tracks end. This is the area at the end of the existing building that is in the setback. The area in the setback is approximately 5%-6% according to Mr. Ziegler. Mr. Ziegler confirmed that building plans that were approved for this site are consistent with the record plan from Tetra Tech. Concerning the surrounding area, Mr. Ziegler said it is difficult to see the church site because of the dense vegetation around the site. He does not feel there would be any adverse impact on neighboring properties as a result of the addition of 12 feet to raise the roof of the bump out area. Aerial photos were entered as Applicant Exhibit #2. Four (4) color photographs were entered as Applicant Exhibit #3. The construction plan drawing was entered as Applicant Exhibit #4. There were no objections noted with any of the exhibits.

Using a drawing showing the site, Mr. Ziegler provided a description of the two (2) previous expansions to the building. The drawing was entered as Applicant Exhibit #5.

Mr. David Sills, general contractor/developer, appeared on behalf of the applicant. He testified that approximately 12 feet would be added to the building if approval is granted. He then provided a brief history of market changes that have led the applicant to seek a variance in order to be competitive. Changes are relative to the cost of ground and the new technology involved with material handling equipment and fitting more storage in less space. *(The building is currently owned (2003) by Harvey Hanna and Associates.)*

There were no members of the public who appeared in favor or against the variance application.

Mr. Tucker provided a hand out detailing his summary of standards. He cited the Quik Check analysis. The building is in a predominantly industrial zone that is adjacent to a residential zone which is heavily wooded. The closest structure is approximately 600 feet away. The nature of the zone is not such that this proposed variance would conflict. The character of the area would not be impacted; the situation has been in existence since the early 1970s without issue. Removing the setback would not seriously affect neighboring properties considering these uses have been working harmoniously for many years and because of the dense vegetation. Lastly, the changes in the market do present a special circumstance concerning being competitive. The Supreme Court in Delaware has ruled that the need to be competitive with other uses in the marketplace may be a reason, though not the sole reason, to seek a variance.

In the City of New Castle there is additional language other than State law that needs to be satisfied. Special circumstances or conditions exist which are peculiar to the land, structure or buildings which are not applicable to other land, structure or buildings in the same zoning district. Testimony confirms the structure was built in the early 1970s and may be the only building in this district that has a non-conforming setback which makes it unique. The railroad track

explains why the bump out is where it is located. The railroad is not operational at this time and there is no intention of the owners to use rail service. Most of the rail has been removed.

That literal interpretation would not deprive the applicant of rights commonly enjoyed by other properties in the same zoning district. Since the conformity is existing today then building up would be consistent with the rights of others who may do the same.

Special conditions and circumstances do not result from the applicant's actions. Testimony has been received detailing the changes in the market place.

Granting of a variance request does not convey on the applicant any special privilege that is denied to other land, structure or buildings in the zoning district. The applicant does not intend to exceed the height limitations. The setback has been in place since the early 1970s.

Mr. Tucker addressed Section 230-9(a) of the City Code that speaks to expansions and non-conforming conditions. In this case the use is not changing, and the estimated cost of the any building involved does not exceed 50% of the replacement value of the building as determined by the Building Inspector in light of the building's current assessed value. Mr. Bergstrom stated that raising the roof of the structure would not increase the assessed value of the structure by half or more. Lastly, the Code allows for any conditions or safeguards be applied, but the applicant does not believe this is necessary given the nature of the application.

Mr. Athey inquired about the chronology of the City's zoning code. Mr. Bergstrom informed it was first enacted in 1950 and the modern code was enacted in 1968. Mr. Athey questioned the building being non-conforming given language in the code versus when the building was constructed. Mr. Tucker informed they also questioned the language but moved forward with the variance to be cautious.

The applicant has attempted to connect with the adjacent property owner about purchasing the 15 foot strip of land next to their property and eliminate the non-conformity entirely. Mr. William Lower, representing Harvey Hanna and Associates, Inc., confirmed that the applicant did attempt to contact the property owner about all options for this property and that there is a meeting scheduled on the evening of 9/22/09. He added that Mr. Hanna enjoys a productive relationship with Rev. Godden and his team and they are good neighbors. The meeting will be with the church's Property Use Committee.

Mr. Athey inquired whether the church is aware of this plan. Mr. Bergstrom said the property was posted and the church has been to several Council meetings to discuss concerns relative to this property so he believes they are informed on the matter. The church is concerned with the proposed rezoning of the church's property to open space that the Planning Commission recommended.

The Board had no further questions.

Mr. Athey has no problem with this project. The church parcel may be rezoned as part of the Comprehensive Plan which would negate the need for the variance. It is an R3 parcel with one side being OS&R and the other side Industrial. He would like to have seen a letter from the church or have a representative here tonight, but the applicant has presented a good case.

Mr. Akin is in basic agreement with Mr. Athey. The portion of the building with the bump out that creates the setback violation has been in existence for several decades and Mr. Tucker has informed that he is unaware of any problems that the setback violation has caused to the church owners. There is wooded land between the bump out portion of the building and the adjacent property. Mr. Tucker has satisfied the Quick Check standards as well as the ordinance variance standards. He asked the Board if they wish to consider a height restriction since testimony has revealed that building heights have increased continually over the years. The applicant is requesting to build up to a height of 39.4 feet and there is still room left to build to reach the City's height restriction. He advised the Board that he has done research on this issue and additional height which does not increase any setback violations is permitted. There does not appear to be any case law in Delaware that says if you have a setback violation you can't go higher to the maximum height restrictions. The section of the Code that Mr. Tucker referenced clearly states that you can increase the cubical volume of a non-conforming structure as long as you are not increasing the setback violation. He confirmed that a variance would be appropriate.

Mayor Klingmeyer agrees with the rationale of both Messrs. Athey and Akin.

Mr. Athey made a motion to grant the variance from the 20 foot side yard setback to 4.8 feet (+/-) as shown on the application. Mr. Akin seconded the motion.

The motion was approved by unanimous vote.

The hearing was adjourned at 7:50 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits

Applicant Exhibit #1 . Tetra Tech Record Plan
Applicant Exhibit #2 . Aerial photos of project site
Applicant Exhibit #3 . Four (4) color photographs
Applicant Exhibit #4 . Construction Plan Drawing
Applicant Exhibit #5 . Site Drawing